No. 820

Supreme Court of the United States

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 820

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. M. LASSING, H. A. THOMPSON, SR., MARSHALL O. THOMPSON, MRS. J. R. HANSON, MRS. RICHARD C. PATRICK, SR., AND H. A. THOMPSON, JR., d/b/a CONSUMERS GASOLINE STATIONS, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Supreme Court should review by certiorari a Court of Appeals decision denying enforcement of an order of the National Labor Relations Board against an employer who was held by the Board to have discriminated against three employees by permanently closing a department and discharging the employees, after unionization of the department, although the employer held no anti-union hostility and had previously determined, for valid economic reasons, to eliminate the department as soon as anything happened to increase its costs, and the employer honestly viewed unionization of the employees as a cost-increasing event.

STATEMENT

Respondent accepts Petitioner's statement of the case with a few exceptions and additions.

The Board made no findings of coercion, interrogation, anti-union hostility or threats.[1] The discharges were not effected in a precipitate or inconsiderate manner. Each driver was given one week's severance pay and was told he would be given recommendations for other employment (J.A. 47a-48a). The conversion to common carriage was fully carried out and Respondent's tractors and trailers were sold (J.A. 22a-23a; 75a).

The basic facts were well summarized by the Board as follows:

> "The findings made above are based upon substantially undisputed testimony. The employer, in its concern over mounting operating expenses, determined for sound economic reason to alter its transport methods before a definite date, or earlier, if unusual expenses occurred. When the Union appeared upon the scene and made its request for recognition as the bargaining representative of the Respondent's drivers, and for a meeting with it to negotiate a collective agreement, the Respondent, correctly or incorrectly, viewed this request as 'the first major expense', the predetermined signal to institute its retrenchment program. Whereupon prompt steps were taken to execute immediately the previously formulated plan to contract to a common carrier the haulage of all gasoline to the service stations." (J.A. 15a)[2]

[1] At page 5 of the Petition it is stated that Respondent's office manager, Hanson, "threatened" the employees with the statement "We'll sell out to Refiners first." Driver Newell Wyatt's testimony concerning this conversation (J.A. 41a) was specifically considered by the Trial Examiner, who concluded that it could *not* be considered as evidence of a possible violation of the Act (J.A. 13a, n. 4).

[2] The word "viewed" in the 10th line of this statement was incorrectly printed in the Joint Appendix as "waived."

Thus, the Board found that Respondent had reached a business judgment, prior to unionization of its drivers, that it would eliminate its transport operations upon the occurrence of any unusual expense. The Board found also that Respondent honestly believed unionization of its drivers to be such an occurrence and that it executed its previous judgment upon this belief.

While finding that Respondent's claimed belief actually existed, the Board was of the opinion that the belief was based only upon the "surmise that it was about to be faced with higher wage costs." (J.A. 17a). The Court of Appeals recognized that the advent of the Union was a new economic factor and concluded that Respondent acted upon reasonably anticipated increased costs. Since the inquiry upon a charge of discrimination goes to the subjective motivation of the employer, the grounds of Respondent's belief are immaterial so long as it actually existed. However, the record amply supports the Court of Appeals' conclusion. Respondent had been told on January 14 by one of the drivers that they had joined the Union to obtain increased pay (J.A. 41a). The Teamsters' scale in this area for drivers was $2.53 per hour, almost double Respondent's rate of pay (J.A. 15a). The Teamsters' business agent who would have negotiated Respondent's contract and who had negotiated 75% of the Teamsters' contracts in the area (J.A. 50a), admitted that contracts with newly organized employers always result in increased costs to them (J.A. 51a) and that pay increases would undoubtedly have been sought for Respondent's drivers (J.A. 52a). Thus, Respondent's stated belief that it anticipated increased costs (J.A. 15a; 68a) was not only honest, but reasonable.

ARGUMENT

I

The Petition seeks to give this case importance by claiming an increase in the number of cases in which

employers claim economic motivation. Where such claims are mere pretext or subterfuge for discriminatory purposes, the Board may so infer, and often does. But here, the Board credited and accepted Respondent's evidence of the economic considerations which motivated its action.

The record belies Petitioner's argument that the Court of Appeals for the Sixth Circuit is usurping the Board's primary responsibility to weigh evidence and choose between conflicting inferences, and that it reversed the Board's findings of discriminatory motivation in this case merely because Respondent pointed to pre-existing facts "which might have supplied an economic motive." The Court of Appeals did not reject any inference made by the Board except the ultimate finding that the Act had been violated. It was compelled from the Board's own findings of fact to a conclusion of law that the undisputed facts demonstrated economic motivation instead of discriminatory motivation.

The Petition is based solely on the argument that unionization led Respondent to advance the date of a planned economic change. If this be true[3], it concerns only causation, not motivation. Under Section 8(a)(3) of the Act, the issue is whether the "real motive" and "true purpose" of the employer was to discourage union membership or activity by discrimination. *Radio Officers Union v. National Labor Relations Board*, 347 U.S. 17, 43–44.

The undisputed evidence is that Respondent's true reason for these discharges was simply the desire to

[3]As noted by the Court of Appeals, Respondent was not committed to continue its uneconomical transport operations until April 1, 1959. This was merely the outer limit. Elimination was to occur earlier if an accident, major overhaul or any other item of unusual expense intervened (J.A. 16a; 69a, 74a). One of these events could have occurred upon any date, including the date of January 20, if Respondent's fleet of transports had been on the road.

better its economic position and avoid increased costs in *any* form. If the predetermined signal of increased costs had been sounded by any other event, the transport operations would have been eliminated just as finally and effectively as they were upon this signal. This is not discrimination. Nor is it an intention to avoid the employer's duty to bargain. Respondent's only intention and purpose was to save expense—of any sort—and this intention was formed long before the Teamsters entered the scene.

This is not to say that any employer can justify any action which discourages Union membership merely because he believes that his employees' protected activity will cost him money. Had Respondent not already determined to eliminate the wasteful transport operation, its claim would be on a different footing. But surely an employer who has already condemned a marginal operation and who honestly and reasonably believes that unionization will increase its costs can take the same action upon this belief as he would take upon any other new economic factor. Respondent's motive is discriminatory only if it can be said that it would have continued its operations if confronted with the prospect of increased costs from some source other than union activity. The Board did not so find.

The Petition speculates that the advent of the Union did not necessarily mean increased costs.[4] If nothing else, the time and expense of meeting and negotiating

[4]For this conclusion, Petitioner relies upon testimony of two isolated instances in which the Teamsters had contracts for wage scales comparable to Respondent's and the business agent's testimony that the Union adjusted its demands to an employer's needs (J.A. 17a; 51a). The Petition fails to point out that this "adjustment" policy always seeks "a decent wage increase" for the employees (J.A. 51a). The Trial Examiner was less charitable than is the Petition. His surmise was that Respondent might have received "a reasonable wage demand." (J.A. 17a 18a).

with the Union was a legitimate factor to consider in evaluating whether to further continue the wasteful department. The unnecessary devotion of management's time to the troublesome trucking operation was a factor which had influenced its original decision. (J.A. 74a, 76a). Also, employers know, as the Court knows, that "the desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action." *Radio Officers Union v. National Labor Relations Board*, 347 U.S. 17, 46. In any event, respondent acted upon an honest belief contrary to the Board's opinion. In determining motive, it is immaterial that a different state of mind might have been entertained. The Board cannot substitute its business judgment for Respondent's.[5]

If upon a record of this type, the Courts of Appeals must yield to the Board's bare conclusion of discriminatory motivation, then the Board will have absolute license to condemn employers as wrongdoers. *Universal Camera Corporation v. National Labor Relations Board*, 340 U. S. 474, does not require that reviewing courts rubberstamp ultimate facts which agencies have inferred from undisputed basic facts. Its holding is precisely to the contrary.

II

Petitioner seeks the issuance of the writ on the ground that the decision of the Court below conflicts with the decision of the Court of Appeals for the Tenth Circuit in *National Labor Relations Board v. Brown-Dunkin Co.*, (C.A. 10, January 19, 1961). A cursory examination of the *Brown-Dunkin* opinion reveals that there is no con-

[5] The Board's speculation that the Union's advent might not have increased costs is based upon a "wage adjustment" policy which may have been known to the Union (see Note 4, *supra*), but which was not known to Respondent. This evidence is therefore not material to Respondent's motives.

flict between the Tenth and Sixth Circuits. In fact, the Court there distinguished *National Labor Relations Board v. R. C. Mahon Company*, 269 F. 2d 44 (C.A. 6), one of the cases assailed by the Petition along with the present one, on the ground that there the "discontinuance of a part of the business was not prompted by an intention to avoid the Act, but resulted from legitimate business motives." (Petition, p. 21, n. 1). In *Brown-Dunkin*, the Board's finding of unlawful motivation was supported by evidence of anti-union hostility and coercive employer action. In *Brown-Dunkin*, there was no evidence that the employer had made an economic decision to eliminate the department prior to the advent of the Union. Subcontracting the operation actually *increased* the employer's costs. These are but a few of the obvious distinctions between that case and the present one.

It is suggested at page 11 of the Petition that *National Labor Relations Board v. Cape County Milling Co.*, 140 F. 2d 543 (C.A. 8) and *Williams Motor Co. v. National Labor Relations Board*, 128 F. 2d 960 (C.A. 8), are likewise in conflict with the present case. In the *Cape County Milling* case, the Board had found that the employer's change in operations was only a "temporary expedient" to avoid unionization and the change was preceded by threats and anti-union hostility. In *Williams Motor Company*, the employer's economic considerations were rejected by the Board as mere "subterfuge" for discriminatory motives.

Contrary to Petitioner's contention, examination of the decisions of Courts of Appeals other than the Sixth Circuit reveals that the cases nearest in point are in accord with the present case. See *Mt. Hope Finishing Company v. National Labor Relations Board*, 211 F. 2d 365 (C.A. 4); *Southern Oxygen Company v. National Labor Relations Board*, 213 F. 2d 738 (C.A. 4); *National Labor Relations Board v. Drennon Products Co.*, 272 F. 2d 23 (C.A. 5);

National Labor Relations Board v. Houston Chronicle Publishing Co., 211 F. 2d 848 (C.A. 5).[*]

In *Mt. Hope Finishing Co. v. National Labor Relations Board*, 211 F. 2d 365 (C.A. 4), the Court of Appeals for the Fourth Circuit took the same realistic approach to unionization as an economic factor affecting an unprofitable operation as did the Sixth Circuit in the present case. There, the employer relocated a textile plant after its unionization. The former plant had operated at a loss and the employer had considered the change before the advent of the Union. Unlike the present case, no definite decision had been made. In reversing the Board's findings of discriminatory discharges, the Court stated

> "... The glaring and undeniable fact which dominates all others in the record is that long before the union made its appearance the business was deteriorating and operating at a loss and that the managers of the enterprise were seeking a suitable location in the South. ... It is no answer to these undisputed facts to point out that prior to the advent of the union the managers had not definitely decided to cease operations in Massachusetts but were examining the advantages of a smaller experimental plant in the South, and that a final conclusion was not reached until after the union appeared. It was not uncertainty as to the existence of the problem but the gravity of removing a business from a location where it had prospered for half a century which justified cautious study before decision. The entrance of the union did not alleviate the trouble but served only to accentuate it, and it was obvious

[*]Petitioner attempts to distinguish *Houston Chronicle* on the ground that there the employer did not accelerate a prior decision because of the advent of the Union. The opinion indicates the contrary and expressly states: "It is the motive for the decision to change over that is material to the controversy rather than the motive for accelerating the change-over." 211 F. 2d 854.

to the company that if it could not make a go of the business prior to 1951, before the union was formed, it would be no better able to succeed after the pressure of the union was added to its existing difficulties. The union was not the cause that closed the business in Massachusetts." (211 F. 2d 371, 372).

One searches the decisions of the Circuit Courts of Appeals in vain for the conflict which the Petition asserts. There is not the slightest reason to believe that any Circuit would have reached a different result in the present case.

III

As a third ground for granting the writ the Petition suggests that the decision below is in conflict with the decision of this Court in *Order of Railroad Telegraphers v. Chicago & Northwestern R. Co.*, 362 U. S. 330. This case held only that the Railway Labor Act and Interstate Commerce Act do not make it unlawful for unions "to want to discuss with railroads actions that may vitally and adversely affect railroad jobs," and that the Norris-La Guardia Act prohibits injunction of a strike in support of such a demand. This case arose under other statutes which have different purposes and policy backgrounds from the National Labor Relations Act and decides a vastly different question from the one involved here.

The principle announced in *Order of Railroad Telegraphers* is not invoved here and was not applied by the Board. In fact, the Board has held under the National Labor Relations Act that the discontinuance of an operation by an employer is not a bargainable issue except as it may present questions of the future tenure of employees whose jobs are abolished. *Bickford Shoes, Inc.*, 109 NLRB 1346; *Butler Chemical Co.*, 116 NLRB 1041; *Shamrock Dairy, Inc.*, 119 NLRB 998; *Brown Truck &*

Trailer Mfg. Co., 106 NLRB 999. And where an employer has violated Section 8(a) (5) by refusing to bargain on this limited issue, the Board has held that it does not render the discharges unlawful under Section 8(c) (3) if the operational change was economically motivated. *Shamrock Dairy, Inc.*, supra; *Brown Truck & Trailer Mfg. Co.*, supra.

Furthermore, this record is not the proper vehicle for a decision by this Court that Respondent violated 8(a) 45) by failing to notify the Union of the operational change. When notified of the elimination of the Respondent's transport operation on January 20, the Teamsters Union did not request to bargain with Respondent upon either the changeover or the future tenure of the drivers, but instead elected to commence picketing and file unfair practice charges (J.A. 55a-56a). Respondent attempted to prove that the Union requested no further meetings after this one, but the Trial Examiner ruled that such evidence was immaterial (J.A. 56a). The basis of the refusal to bargain charge against Respondent was that it had discriminatorily discharged its drivers in violation of Section 8(a)(3) and that consequently their legal status as employees, and that of the Union as their representative, continued on January 20.[1] Respondent was never apprised that it was charged with an unlawful failure to bargain concerning the changeover, and the proceedings before the Board did not treat this as an issue.

CONCLUSION

None of the grounds for granting petitions for certiorari, as set forth in Rule 19 of the Revised Rules of

[1] The only facts alleged in support of the General Counsel's complaint were that Respondent "discharged . . . and refused to reinstate its employees . . . because of their membership in, and activities on behalf of, the Union, and because they engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection." (J.A. 36a).

the Supreme Court, are present. There is no conflict among the Courts of Appeals and no conflict with a previous decision of the Supreme Court. The case presents no new point of law but merely involves the application of settled principles to undisputed facts.

For these reasons the petition for certiorari should be denied.

Respectfully submitted

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